No. 93-513

Supreme Court, U.S.
FILED
OCT 21 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: APPLICATION OF
SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN,
AND EDWARD FODEN,

Petitioners,

—v.—

SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

PHILIP L. GRAHAM, JR.
125 Broad Street
New York, New York 10004
(212) 558-4000
Counsel for Petitioners

Of Counsel
HENRY CHRISTENSEN III
BASIL P. ZIRINIS III
ANTHONY C. WALSH
SULLIVAN & CROMWELL

STEVEN R. HUMPHREY
ROBINSON & COLE

October 20, 1993

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

1. There is a clear conflict among the circuits. . . 1

2. References in legislative history to the use of U.S. discovery procedures do not establish that a discoverability requirement was not intended. 5

3. The resolution of this circuit split is necessary for the orderly administration of justice. 5

4. The policy concerns underlying the discoverability requirement are real and significant. 6

5. The discovery sought would not be available in Chile. 7

6. Petitioners would be prejudiced severely by a grant of one-way discovery. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page(s)

In re Application of Asta Medica, S.A.,
981 F.2d 1 (1st Cir. 1992) 3, 4, 7, 8

John Deere, Ltd. v. *Sperry Corp.*,
754 F.2d 132 (3d Cir. 1985) 4, 6, 7

Lo Ka Chun v. *Lo To*,
858 F.2d 1564 (11th Cir. 1988) 3, 8

In re Malev Hungarian Airlines,
964 F.2d 97 (2d Cir. 1992), *cert. denied, sub nom. United Technologies Int'l, Inc.* v. *Malev Hungarian Airlines*,
113 S. Ct. 179 (1992) 5, 6

In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago,
848 F.2d 1151 (11th Cir. 1988), *cert. denied sub nom. Azar* v. *Minister of Legal Affairs of Trinidad and Tobago*,
488 U.S. 1005 (1989) 3, 4, 8

United States v. *New York Telephone Co.*,
434 U.S. 159 (1977) 7

STATUTES

28 U.S.C. § 1782 . . . . . *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: APPLICATION OF
SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN,
AND EDWARD FODEN,

Petitioners,

—v.—

SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI,

Respondents.

REPLY TO BRIEF IN OPPOSITION

The decision of the Second Circuit below creates a clear conflict among the circuits that unless swiftly resolved will undermine the fundamental purposes of 28 U.S.C. § 1782, prevent uniform application of federal law and risk damage to the foreign relations of the United States.

1. There is a clear conflict among the circuits.

Although Respondents apparently disagree, the Second Circuit plainly (and correctly) recognized that its decision below creates a direct conflict among the circuits. The court stated, for example, "[t]he Fodens cite First and Eleventh Circuit decisions that explicitly read a discoverability requirement into section 1782 and argue that the reasoning in those decisions is persuasive [citations omitted]. We disagree. * * * We hold that section 1782 does not contain a requirement that the material requested in the

district court be discoverable under the laws of the foreign jurisdiction." (Petition Appendix A13 (footnote omitted); A18-A19.)

Respondents try to obscure this circuit split by arguing that the "tension" between the Second Circuit and the First and Eleventh Circuits "is not *whether* to examine foreign discoverability, but *when*." (Brief in Opposition ("Opp.") at 11 (emphasis in original).) In truth, the issue is not when, but *how* to examine discoverability — by making it merely a factor that courts may in their discretion consider or reject, or by making it a prerequisite test that must be applied to bar discovery in the United States whenever it would be barred in the forum where the foreign proceeding is pending. On this, the circuits take diametrically opposed views.

The foundation of Respondents' attempt to reconcile the various circuit opinions is their position that the "Second Circuit held that foreign discoverability *should* be considered by the district court" in determining whether to grant discovery. (Opp. at 11-12 (emphasis added).) The decision below, however, did not say "should"; it said "may":

> "[D]istrict judges may well find that in appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782. We hold, however, that no such threshold requirement exists in the statute."

(A13.) The use of the word "may" establishes that in the view of the Second Circuit, district courts may consider — and therefore may at their option decline to consider — the question of discoverability. The so-called "tension" between the Second Circuit and the other circuits is thus a true conflict about whether courts may — or must — examine foreign discoverability at all.

Respondents also attempt to reconcile the circuit opinions by stating that the First and Eleventh Circuits focused on "whether" to consider discoverability, while the Second Circuit focused upon "when" to do so, "at the threshold or in the exercise of the court's discretion." (Opp. at 18) This effort at reconciliation also fails because, at heart, the issue is not a temporal one. Whatever standard is applied, the determination of discoverability must obviously be made *prior* to granting U.S. discovery or there is no

use making it at all. Judicial references to a "threshold requirement" (*e.g.*, A13) are not merely references to the timing of the determination. They are intended to distinguish between a bright line rule applied to bar litigants from discovery *at the threshold* and a rule — regardless of when applied — that merely permits discoverability to be weighed (or not weighed) in the discretion of the district court. This is how Petitioners and the Court of Appeals used the term, and how it is used in common parlance. The issue cannot be diminished to one of mere timing by Respondents' *ipse dixit*.

More important than these distinctions in terminology, however, is the fact that the First and Eleventh Circuits ultimately addressed both "whether" *and* "when" — holding that the district courts must determine *whether* the discovery would be available in the foreign jurisdiction and that they must do so at the outset. For example, the Eleventh Circuit held:

> "the district court *must* decide *whether* the evidence would be discoverable in the foreign country *before* granting assistance."

In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar* v. *Minister of Legal Affairs of Trinidad and Tobago*, 488 U.S. 1005 (1989) (emphasis added).

In addition, it is quite clear that if the documents sought in *Trinidad and Tobago* had not been discoverable in the foreign country, the Eleventh Circuit would not have affirmed the district court's grant of discovery. The court's insistence upon satisfaction of the discoverability requirement was thus not "dictum" (Opp. at 19), but a statement of the legal test the court was applying to the facts before it. *See also Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) ("if the court finds that the evidence is not discoverable, the subpoenas duces tecum are due to be quashed.").

Respondents' attempt to evade the force and reasoning of the First Circuit's decision in *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992), is equally unavailing, and is significantly undermined by the Respondents' own contradiction from one sentence to the next. Respondents first state (accurately) that "[t]he [*Asta Medica*] panel required '*a threshold showing* that

the information would be discoverable in the foreign jurisdiction if located there'" (quoting the First Circuit's decision, 981 F.2d at 6 (emphasis added)), but then claim that "[t]he panel did not focus on whether foreign discoverability should be considered at the threshold or in the exercise of the district court's discretion." (Opp. at 20.) Not only is the latter statement contrary to the former, it is belied by the First Circuit's express statement that the district court's "discretion . . . is limited by the restriction that we find . . . to be implicitly required by section 1782 [*i.e.*, the discoverability requirement], based upon its history, rationale, and the policy considerations we have discussed." 981 F. 2d at 7.

In short, the conflict between the circuits is irreconcilable, as the court below recognized and the plain language of prior opinions confirms.

Analysis of the First and Eleventh Circuit decisions also makes clear that those courts need "no opportunity to reconsider their statements," as Respondents suggest. (Opp. at 20.) These are not ancient or ill-considered judgments. They are recent cases, fully briefed and argued that simply reach a different result on an important issue of statutory interpretation and foreign policy. Respondents concede that if, upon being given an "opportunity to reconsider" their prior decisions "those circuits reject the holding of the Second Circuit, those later decisions will provide an appropriate occasion for this Court's review." (Opp. at 21.) Respondents miss the point; those circuits have already rejected the holding of the Second Circuit. The appropriate occasion for this Court's review is now.[1]

---

[1] Respondents try to minimize the split among the circuits by arguing that the Third Circuit's decision in *John Deere, Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985), "requires not a threshold showing of foreign discoverability, but rather the appropriate exercise of the district court's discretion on the facts of a given case." (Opp. at 17.) This is just not so, as was demonstrated in the Petition (at 8-9) and recognized by both the First and Eleventh Circuits, each of which cites *John Deere* as having imposed a discoverability requirement. *See Asta Medica*, 981 F.2d at 6 ("In order to avoid offending foreign tribunals, other courts have established, as *a prerequisite to granting a request for assistance* under Section 1782, a threshold showing that the information would be discoverable in the foreign jurisdiction if located there.") (citing, *inter alia*, *John Deere*, 754 F.2d at 136); *Trinidad and Tobago*, 848 F.2d at 1156.

2. References in legislative history to the use of U.S. discovery procedures do not establish that a discoverability requirement was not intended.

Respondents also oppose certiorari by contending that the Second Circuit's decision is correct, mainly because it is consistent with an interpretation of legislative history offered by Professor Hans Smit. (Opp. at 14-15.) With due respect to Professor Smit, his views do not cure the split among the circuits. Moreover, Smit's writing, and the Senate history to which he refers, are not in point. They merely establish that if matters are discoverable in the foreign forum, the *procedures* used to obtain U.S. discovery can be different ones than the foreign court would permit. For example, if the information could be collected in the foreign forum by compelling production of documents, but could more efficiently be obtained in the U.S. by a deposition, the latter should be permitted. (Opp. at 14.)

This point does not address the true question: whether to permit U.S. *compulsory process* to be used to obtain information in the United States if compulsory process would not be available to obtain such information in the foreign jurisdiction. It is this issue of the use of compulsion on which the circuits are split. And it is this question — whether U.S. courts should have the power, in effect, to intervene and potentially alter the outcome of a foreign proceeding when the foreign court would have no such power — that raises fundamental issues about sovereignty, fairness and the uses of American power. On this issue the Second Circuit has departed radically from the views of its sister courts.

3. The resolution of this circuit split is necessary for the orderly administration of justice.

Respondents' argument that the "foreign discoverability issue is of little practical significance" is based on the erroneous assertion that the "issue has arisen in fewer than half a dozen cases in almost 30 years . . . ." (Opp. at 11.) In the first place, it is impossible to know in how many cases the question has arisen without knowing how often § 1782 applications have been granted after a proper showing of discoverability. For example, in *In re Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), *cert.*

denied, sub nom. United Technologies Int'l, Inc. v. *Malev Hungarian Airlines*, 113 S. Ct. 179 (1992), decided by the Second Circuit on other grounds, the question of whether to impose a discoverability requirement was not faced because, as the court found, the information was discoverable under Hungarian law. 964 F.2d at 100.

Equally important, the federal courts have been required to deal with § 1782 applications in general, and the issue of discoverability in particular, with increasing frequency. Of the more than sixty cases reported on LEXIS concerning § 1782, approximately two-thirds arose in the past ten years, and approximately half arose in the last five years. In at least nine different reported cases since 1988, the issue of discoverability has been presented, either in the context of applying the discoverability requirement, or more generally. Respondents' repeated assertion that "for more than 20 years" the discoverability issue was not a subject of dispute (*e.g.*, Opp. at 11) simply underscores the accelerating pace of decisions in the area. The clear and well-developed split between the Second Circuit and four other circuits on this point — expressed in decisions issued in 1985, 1988, 1989, 1992 and 1993 — alone establishes that this is an issue of practical, and immediate, significance.[2]

4. The policy concerns underlying the discoverability requirement are real and significant.

Respondents characterize the policy concerns underlying the discoverability requirement — the risk of offending foreign sovereigns and thereby undermining § 1782's ultimate purpose of encouraging foreign cooperation in providing discovery; unfairly disadvantaging U.S. litigants in foreign proceedings; and placing an undue burden on the federal courts — as a "parade of horribles" and a "hypothesis" that is "inherently unbelievable." (Opp. at 21.)

---

[2] The fact that as recently as the *John Deere* decision in 1985, the federal courts had not resolved the question of whether § 1782 could only be invoked to seek evidence admissible in the foreign court, 754 F.2d 132, 134, explains in part why the discoverability requirement has only recently been pushed to the forefront as the federal courts have had to determine the permissible extent of discovery. (*See* Petition at 10-11.)

Yet Petitioners were not the first to identify these concerns; the Courts of Appeals that imposed the discoverability requirement did so. *See, e.g., Asta Medica*, 981 F.2d at 5-7; *John Deere*, 754 F.2d at 135-37. If these concerns are "inherently unbelievable," it is odd that the Second Circuit is the first court to diverge from the consistent series of decisions holding that the discoverability requirement is necessary to protect against these dangers and to effectuate the purpose of § 1782.

5. The discovery sought would not be available in Chile.

Respondents argue that the discoverability issue is somehow moot because in their view, the information sought is discoverable under Chilean law. (Opp. at 12.) Respondents state that they are "entitled to defend the judgment of the court below on any ground raised below" (Opp. at 24 n.5), and that they "demonstrated in the district court and the court of appeals that the discovery sought would be available to them under the laws of Chile." (Opp. at 12, 24). The cases they cite also require, however, that "the record permit" the alternative ground put forward. *See, e.g., United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). The record here does not permit any such argument.

To support their theory, Respondents attempt to blur the plain distinction between voluntary production of information — which is all they have shown is contemplated in an inventory under Chilean law — and invocation of the compulsory discovery powers of a U.S. court that has no analog under Chilean law. (Opp. at 24.) They then claim that Chilean sovereignty could not possibly be offended by a U.S. court granting Respondents the power to compel production of documents and to compel witnesses to appear to be cross-examined under oath, because in Chile similar information may be produced voluntarily. The one simply does not follow from the other: it is the act of judicial intervention through U.S.-style discovery that creates a distinction not just in degree but in kind from the voluntary information-gathering permitted in the foreign forum.

Respondents have also conceded (in their brief to the Second Circuit to which they cite in their Opposition (at 24 n.5)) that they submitted no proof to support the claim that the discovery sought here would be available to them in Chile through *compulsory*

process for use in the incompetency proceeding — the only proceeding on which they base their application. (Respondents' Brief to the Second Circuit, dated April 12, 1993 ("Resp. 2d Cir. Br.") at 28 n.6.) Respondents also admitted that the district court failed to reach that question (*id.* at 26) and the Second Circuit agreed: "the district court did not make a finding as to the parties' ability to obtain pre-trial discovery under Chilean law . . . ." (A17.)

In other words, Respondents have acknowledged both that the district court failed to rule on discoverability under Chilean law, and, most importantly, that there is no record evidence to support a finding of discoverability. At the least, then, assuming that this Court finds a discoverability requirement, these facts require remand to the district court for a determination of whether the information sought from Petitioners would be discoverable under Chilean law for use in the incompetency proceeding.[3] In the Court of Appeals Respondents explicitly agreed that this is so. (Resp. 2d Cir. Br. at 28-29.) The issue of discoverability is thus not only squarely presented; it cannot be mooted by reliance on other grounds for affirmance of the opinion below.

6. Petitioners would be prejudiced severely by a grant of one-way discovery.

Finally, the concern expressed by the First Circuit in *Asta Medica*, 981 F.2d at 5-6, that the denial of a discoverability requirement will place U.S. litigants in foreign proceedings "at a substantial disadvantage vis-a-vis the foreign party" is not, as Respondents claim, "academic" simply because Petitioners are not parties to the Chilean incompetency proceeding. (Opp. at 23.)

First, in both *Trinidad and Tobago* and *Lo Ka Chun*, the Eleventh Circuit imposed the discoverability requirement on foreign litigants seeking discovery from *non-parties* to the foreign proceedings. 848 F.2d at 1152; 858 F.2d at 1565. The issue of granting one party greater discovery than another by the

---

[3] Petitioners presented evidence below demonstrating that compulsory process is not available in Chile to obtain the discovery sought here. (*See generally* Joint Appendix below at J.A. 188-241; 334-363.)

happenstance of a U.S. connection does not depend upon whether a *party* is located in the U.S. but on what discoverable information may be found here.

Second, Respondents' argument ignores what is plain from the opening pages of Respondents' brief to this Court, in which they repeat the main points of their prior vituperative attacks on Ana Eguiguren (Opp. at 3): they are preparing for future litigation against Mrs. Eguiguren and her family, including Petitioner Maria Luisa Foden. Petitioners are thus far from being neutral third party witnesses — they are targets of Respondents' litigation strategy whether or not they are parties in the technical sense to the Chilean proceeding. Respondents thus seek for their own adverserial purposes to compel one-sided discovery that no U.S. court would ever allow in a U.S. proceeding, and that is not permitted in Chile.[4]

---

[4] Petitioners have not responded to the false charges made against them in the district court and repeated in the Court of Appeals and this Court. To have done so would, among other things, have provided Respondents with precisely what they sought through their personal attacks upon Petitioners: the production of information to which Respondents are not entitled. Respondents have never submitted any documentary evidence in support of their allegations, but have relied solely on the hearsay affidavit of an "investigator" whom they apparently regard as competent to give opinions on U.S., Chilean and Panamanian law as well as facts he supposedly uncovered. (J.A. 11.) Stripped of their sensational rhetoric and unsupported charges of scandal, Respondents' papers below said nothing more than that Mr. Gianoli may have chosen to involve Petitioners in his financial affairs at a time when he was unquestionably competent to do so. (J.A. 20-29.) True or false, this is wholly irrelevant to whether Respondents properly may use § 1782 to obtain discovery from Petitioners, as well as to the question of whether a writ should be granted to decide these important issues.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PHILIP L. GRAHAM, JR.
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioners

HENRY CHRISTENSEN III
BASIL P. ZIRINIS III
ANTHONY C. WALSH
Sullivan & Cromwell

STEVEN R. HUMPHREY
Robinson & Cole

Of Counsel

October 20, 1993